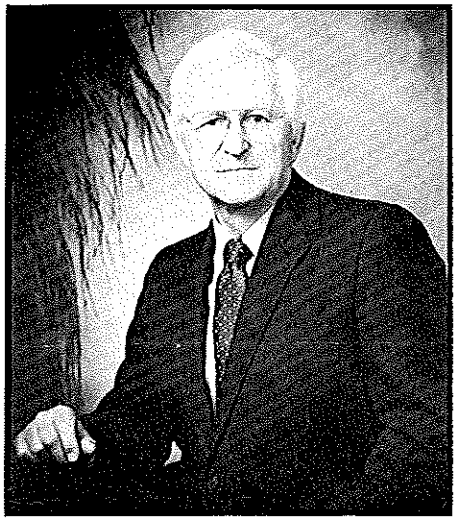
defense UPDATE

The Iowa Defense Counsel Association Newsletter April, 1990 Vol. III, No. 2

THE DECLINE OF PROFESSIONAL COURTESIES

Philip J. Willson of Smith, Peterson, Beckman and Willson, Council Bluffs, Iowa, examines a growing problem.



Philip J. Willson

There seems to be general recognition of a decline in professional courtesies. Many local Bar Associations have adopted codes of professional courtesy. The subject of courtesies is closely related to frivolous claims and abusive tactics in litigation. Judge Mark S. Cady's article on litigation abuse and misuse, 36 Drake L.Rev. 483 summarizes the explanations given by legal commentators, including: Increased population, rapid growth of the number of lawyers, the litigious nature of our changing society, the large increase in the number of lawsuits filed, the greater number of complicated cases involving more parties, the expanding nature of tort theories, and the effect of inflation on the size of verdicts.

The rapid growth in the number of lawyers seems to be one of the primary causes. In 1960 there was approximately one lawyer for every 622 persons and by 1985 there was one for every 354 citizens. In 1959 an American Bar Association committee observed "the law is becoming a dwindling profession." In 1960 the legal profession was a much smaller group and, therefore, there were more contacts among lawyers and more peer pressure to maintain standards of professional courtesy. Minimum fee schedules were recognized during the early 1960's and it was considered unprofessional to fail to follow the minimum fee schedules. In 1975 the U.S. Supreme Court struck down minimum fee schedules and observed that the practice of law had business aspects. In 1977 the U.S. Supreme Court put limits on the extent to which advertising by lawyers could be prohibited. In 1960, in spite of minimum fee schedules, most fees were probably based on an exercise of judgment which included considerations of the amount of time spent, the uniqueness of the issues, the result obtained, and the client's ability to pay. Today, most fees are probably based almost entirely on the time spent. The Report of Commission on Professionalism presented to the American Bar in August, 1986 (112 F.R.D. 243) also points out that the increasing expense of litigation may also contribute to increased competition and a decrease of professionalism. The Report points out that in 1984 it cost law firms an average of $62,000.00 a year per lawyer in overhead. The Report also observes that the increased complication of issues, increased discovery, and increased number of parties has caused the stakes to be higher and perhaps increased the amount of competition.

There has been much concern about the filing of frivolous lawsuits and discovery abuse. At one time it was anticipated that discovery would be self-executing in the sense that lawyers would conduct their discovery without court involvement. When that system failed, there was an effort to get more court involvement in monitoring discovery. However, with the advent of notice pleading and the increased complications resulting from multiple theories and multiple parties, a large amount of court time is needed to gain enough understanding to determine whether there is discovery abuse. The current emphasis seems to be a combination of court involvement and increasing the use of sanctions such as Federal Rule 11, Iowa Rule 80(a) and Iowa Code ¶ 619.19. These sanctions are increasingly aimed at the attorneys rather than the parties. The Iowa Supreme Court is increasingly assessing penalties pursuant to Appellate Rule 19(b) against attorneys for missing appeal deadlines. Penalties for late settlement of cases have been included in Iowa Rule of Civil Procedure 181.4.

The number of local Bar Associations adopting codes of professional courtesy seems to be increasing. In one sense it seems unrealistic to think that courtesy can be imposed by any code.

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MESSAGE FROM THE PRESIDENT

Craig D. Warner

There is much value in "networking" amongst trial lawyers and the IDCA is the best vehicle for the Iowa defense trial bar to keep abreast of what's happening in the state that doesn't get officially reported or otherwise heard through the grapevine. The Board of Directors and officers of the Association are committed to increasing member services and encouraging increased member participation in the affairs of the Association.

The Association has retained the services of the professional management firm of Rohm & Oggero Association Services, Inc. of Des Moines to provide us mail receipt and forwarding services, telephone answering services and a situs with computer assistance so that we may achieve our long standing goal of providing an expert witness bank, brief bank and trial court reporting system. Impediments in establishing these programs have always been the lack of a situs and the warehousing of material. These obstacles are now removed and we hope to have these services in place by this fall.

The basic format of the services will enable a member who is confronted with or in need of an expert witness to call or write the Association headquarters and through computer entries he or she can learn the identity of and whether this expert has earlier testified or given reports on a particular subject. The inquiring member will then be given the name of another member who has the information requested and it can be directly obtained within the membership. The same procedure will be used for briefs. Case reports can be printed off the computer and called or mailed to an inquiring member. These services will, of course, be as valuable as members make them. All a member need do is take five minutes to send in an input form and retain the relevant transcript or brief in his office. These services are nothing new within some other organizations, but utilizing statewide computer information storage and referral systems, we envision a very workable and valuable service.

By now you should have received our first set of IDCA recommendations for the new Iowa Uniform Jury Instructions. The work product of the Task Force is outstanding. Anyone wishing to be included on our Task Force is encouraged to contact Dick Sapp of Des Moines.

Due to the "politics" of the legislature this year and its anticipated early adjournment, it does not appear there will be any tort reform bills of consequence or controversy coming out of committees and therefore our legislative agenda as well as the plaintiff's bar's agenda has been put on hold for this year.

The Association has been fortunate in the past in its legislative successes without the necessity of a political action committee and to some extent receiving the benefit of political contributions made on behalf of the clients of the defense bar. At our last Board of Directors meeting, February 3rd, the Board received and approved the report and recommendations of a committee to study the desirability of the Association establishing a PAC. The Committee found that because so much of our legislative program is reacting to that of the plaintiffs bar which are fairly heavy contributors, our legislative program is hampered without PAC contributions. Therefore the Board approved the recommendation of the study committee and has established a PAC with Alan Fredregill as Chairman, Kevin Kelly, Treasurer, and the Legislative Committee as the initial officers and Committee.

The Drake University Law School has now hosted the sixth consecutive National Intercollegiate Mock Trial Tournament and it appears the Tournament has now found a permanent home at Drake. This year over seventy colleges and universities participated and the IDCA participated with a contribution to sponsor the reception.

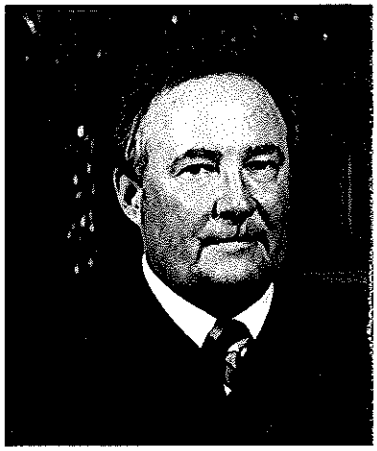
In March your Association again sponsored its twenty-second continuous law school seminar programs at the Iowa and Drake law schools as part of their trial advocacy programs by hosting a live federal pre-trial conference and conducting live summary jury trials. The summary jury trial format provides a unique experience for the students and our programs are well received and appreciated by the law schools and students.

Craig D. Warner,
President

FROM THE BENCH

"... 'The boy who cried wolf'... or 'The lawyer who cried continuance'."

The Honorable Phillip R. Collett, Chief Judge, Eighth Judicial District



Phillip R. Collett

In the process of litigation, there are few situations that generate more controversy than that period of time from the filing of a petition to the day of trial. It is not unusual to have more disputes during this phase than during the trial itself. Judges sometimes find themselves immersed in time-consuming problems at a time when their involvement in a case should be at its lowest point.

This article is not intended to fix blame but merely contains some observations from years of dealing with the thorny problems that occur in the preparation of a case for trial. Hopefully, these comments may give some insight to practitioners which they might be able to use to their advantage.

More importantly, this article suggests an easy solution to these "thorny" problems, that solution being the use of good trial preparation habits. These habits include such things as following pre-trial scheduling deadlines and timely answering interrogatories and supplementing them. The end result is being ready for trial on the day it is scheduled for trial.

An attorney's reputation is established by his habits in preparing a case for trial. It is common practice for lawyers to discuss the attributes of judges and pin labels on them. Likewise, judges and court administrators discuss lawyers and pin labels on them. Generally the labels are nearly always accurate and very difficult to change. The reputation of lawyers with their peers, the judges, and the court administrators influences the preparation of a case and its assignment for trial. Good or bad, right or wrong, this is simply a fact of life for the practitioner. Whether conscious or not, if the reputation is good, then so is the treatment. The converse of this situation is also true.

A classic example of reputation influencing the treatment received by attorneys arises in a request for a continuance. When confronted with these requests, all too often the story of "The Boy who Cried Wolf" comes to mind. Unfortunately the title to the story could be changed to "The Lawyer Who Cried Continuance." The moral of the story remains unchanged. When a lawyer is always asking for a continuance and has become known for doing so, it is difficult to listen to him and take his request seriously, even in situations when there is a real need for the continuance.

Few lawyers recognize the "edge" of one who almost never asks for a continuance. Those in the court administrator's office responsible for scheduling cases for trial love the "edge" lawyer and pay him due deference. Recently it has become the "norm" for civil jury cases to contain a multitude of parties and lawyers. These cases, out of necessity, need to have a lead-off position on the day of trial. The slots for lead-off cases are few, and the competiton for them is great. Case coordinators often have to spend many hours in scheduling such a case. You don't have to be a genius to guess the thinking of the case coordinators. They will be inclined to schedule those cases that will cause them the least trouble... those in which the lawyer will probably not ask for a continuance. Otherwise, the many hours put into scheduling a case originally will just have to be repeated if a continuance is granted.

There will always be good grounds for a continuance in some cases, but it has been my experience that many are really based upon the fact that the attorneys are simply not ready for trial. An example of this occurred recently. The petition was filed in June, 1988. In February, 1989, the case was set for trial on a date certain in February, 1990, after conferences with the attorneys. Deadlines were imposed on disclosure of experts in the fall of 1989, but they were extended to December, 1989. The trial assignment filed November, 1989, scheduled the case for trial as a lead-off case in February, 1990, on the same date previously scheduled one

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year ago. A few days prior to trial, the attorneys became involved in a dispute over when a deposition of an expert could be taken. They could not reach a suitable time for the taking of a deposition, so they asked the Court for a continuance. For over a year the attorneys had a fixed trial date and yet had last-minute problems with discovery. They had the best of two worlds—a fixed, firm trial date and plenty of time to prepare for trial. With all of this, they apparently had no qualms in asking for a continuance, a practice which appears to be growing. Attorneys who habitually ask for continuances in situations like this one, and who develop a reputation for doing so, will not only be turned down but will likely find their cases being scheduled in back-up slots.

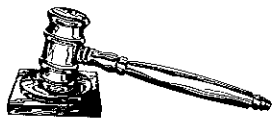
Another area where bad habits have become common-place is the discovery phase of a case. This results in more and more of the trial judge's time being used unproductively in resolving these disputes. It seems almost routine in a civil case to order attorneys to do that which is already required of them under the Rules of Civil Procedure. For some reason unknown to me, just as some people like being "fashionably late," lawyers sometimes appear to like being "fashionably disregarding discovery requests." This not only delays preparation of the case but generally results in attorneys being overly antagonistic with each other, which leads to the non-defaulting attorney reciprocating by also not timely responding to interrogatories or by furnishing answers that really are not answers. In addition to the increasing problems between the lawyers, it becomes especially annoying for a judge to be constantly embroiled in a discovery battle with the same attorneys.

The problems all too often escalate to the point that a judge is asked to invoke a serious sanction against a party. The judge is then faced with the dilemma that the sanction is against the party rather than the defaulting attorney. In the last analysis, the party usually knows nothing about the problem, but if he did, you could be sure he would timely file answers to the interrogatories.

I suppose there can always be too much of a good thing. Recognizing that one of my pet peeves is a lawyer failing to timely supplement answers to interrogatories and my propensity to "preach" on the subject, a rather humorous incident occurred in a recent civil jury trial. The trial was going smoothly. The answers to interrogatories and supplements were timely filed. The pertinent information as to the identity of the expert was given in the first answer and his opinion was set out in some detail in the supplement to the answer. At last, I had no discovery problems! All of a sudden opposing counsel started cross-examining the expert as to the timing of the answers to the interrogatories. As the questioning continued, the jury and myself soon learned that the expert's answer to the interrogatory, and the supplement containing the expert's opinion, were filed *before* he had even become involved in the case. With tongue in cheek, the attorney employing the expert came up to me and said, "Well, Judge, at least you can't fault me for failing to timely supplement." Strangely, the expert's testimony at trial was identical to his opinion contained in the supplemental answers. While I do not subscribe to being *that* diligent, it didn't hurt the party who employed the expert as he won the case.

Continuance motions and pre-trial discovery problems are merely illustrations of the problems which arise for clients when they are represented by attorneys who have poor trial preparation habits. A noted military commander (Frank Burns of the old television show M.A.S.H.) once said, "Never have so many suffered so much so that so few could be so happy." Apparently some attorneys, using this as a rallying cry, have pursued pre-trial tactics which, though satisfying their needs, are harmful to the system in general. In consistently pursuing such tactics, these attorneys will acquire unwanted reputations. These attorneys can be identified by listening to their complaints about judges denying their requests for continuance or case coordinators who always seem to be scheduling their cases as the eighth back-up case.

Lawyers with favorable reputations earned by good trial preparation habits don't spend time in court with discovery disputes and they don't have problems with court administrators in scheduling their cases for trial. In other words, they are preparing for trial rather than spending time avoiding preparing for trial. No matter how much avoiding is done, there always comes a point in time when you must prepare for the trial.



ARE DEFENSE ORIENTED REFORMS HAVING THE DESIRED EFFECT?

by Mike Ellwanger

In previous articles the impact of Chapter 668.11 and Rule 125(a) have been analyzed. In this, the final chapter of the series, there will be a brief review of a number of other supposedly amelioratory acts.

1975 Legislative Session

Perhaps the most important piece of legislation was passed in 1975 in response to the medical malpractice crisis which was being experienced at that time. Chapter 147.136 provides that in an action for damages for personal injury against a physician, surgeon, etc., based on the alleged negligence of the practitioner, the damages awarded shall not include actual economic losses incurred or to be incurred in the future to the extent that those losses are replaced or indemnified by insurance, governmental programs, or any other source except the assets of the claimant or the claimant's immediate family. As a result, to the extent that injuries have been partially compensated through insurance, governmental programs, social security and the like, there can be a substantial offset against the alleged economic loss. In many cases involving young people, inasmuch as they have no lost earnings, the accrued specials at the time of trial can be reduced to practically nothing. This Code section has been held to be constitutional on at least two occasions. *Rudolph v. Iowa Methodist Medical Center,* 293 N.W.2d 550 (Iowa 1980) and *Lambert v. Sisters of Mercy Health Corp.,* 369 N.W.2d 417 (Iowa 1985).

In 1975 Congress passed the Education for All Handicapped Children Act (EAHCA) to assure that handicapped children receive a free and appropriate education. The Act is an amendment to the Education of the Handicapped Act, codified at 20 USC §§1400-1485.

If the defendant can prove that the injured plaintiff has suffered a substantial reduction in life expectancy and that during the minority of the plaintiff his or her needs will be taken care of by virtue of governmental programs and also the school district as mandated by EAHCA, the plaintiff may be in a situation where he or she can demonstrate no actual economic loss.

The 1975 legislature also passed laws regarding informed consent forms, contingent fee contracts and expert witness standards (Chapters 147.137, 147.138 and 147.139). These sections appear to have had little if any impact on medical malpractice litigation.

1986 Legislative Session

The next wave of supposedly defense oriented legislation came in the legislatures of 1986 and 1987.

The 1986 legislature passed Section 668.11 requiring disclosure of experts in professional liability cases, which was discussed in a previous article. The same legislature also passed Section 668.12 which provided defendants with the so-called "state of the art defense" in product liability cases. This Code section has not been interpreted by the Supreme Court and appears to be little more than a codification of common law.

A unique approach to large judgments in catastrophic cases is found in Section 668.3(7). That Section provides that when a final judgment is entered any party may petition the Court for a determination of the appropriate payment method of such judgment. The Court may order all or part of the judgment to be structured. The Section has never been interpreted by the Iowa Supreme Court. Perhaps this is because defense counsel in Iowa are so superb they are never confronted with the situation of trying to make the best of a bad situation after a major damage award. There are a number of interpretative problems with this Section. Suppose there is a $2 million verdict for past and future damages. Can the Court order the defendant to spend $2 million in purchasing a structure? Would it be enough if the defendant simply purchased an annuity to replace the stream of income which caused the jury to conclude that there were $2 million in damages? Can the defendant actually spread the $2 million out over the life expectancy of the plaintiff? If anyone knows how this Section may have been interpreted by Trial Courts, such information would be appreciated for later use in this publication. Perhaps the best use of the Code Section is to promote a slightly better settlement pending appeal.

The 1986 legislature also passed Section 619.18 which prohibits the plaintiff from stating the amount of money damages in the petition. This

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Section had previously been applicable only to malpractice cases, but was extended to all cases for personal injury or wrongful death.

Effective April 1, 1986, the Iowa Supreme Court adopted Rule 80 which is basically the same as Federal Rule 11 allowing sanctions for groundless or frivolous pleadings and lawsuits. This Rule has generated at least five opinions by the Iowa Supreme Court. *Franzen v. Deere & Company,* 409 N.W.2d 672 (Iowa 1987) (Trial Court loses jurisdiction to impose sanctions after final appellate decision in case); *Darrah v. Des Moines General Hospital,* 436 N.W.2d 53 (Iowa 1989) (the court may impose sanctions after voluntary dismissal); *Citizens State Bank v. Harden,* 439 N.W.2d 677 (Iowa App. 1989) (sanctions approved against pro se defendant for filing counterclaim which is contrary to law); *Hearity v. Iowa District Court,* 440 N.W.2d 860 (Iowa 1989) (sanctions approved generally in case, but statute to operate prospectively only); and *Mathias v. Glandon,* 448 N.W.2d 443 (Iowa 1989) (Court looks only at whether a reasonable inquiry was made prior to filing of suit—no continuing duty). The latter case contains an excellent discussion of the various factors which a Court will look to in determining whether a party has made a reasonable inquiry into the facts and the law prior to filing suit.

Inexplicably, the legislature adopted Rule 80 in statutory form effective July 1, 1986.

1987 Legislative Session

The 1987 legislature adopted Section 668.13 effective July 1, 1987. Aside from establishing the interest rate on judgments, this Section provided that interest awarded for future damages shall not begin to accrue until the date of the entry of judgment. Section 668.13(4). On its face, this would appear to be a good idea for defendants. Unfortunately, this Section appears to have led to Section 668.3(8) which provides that the jury shall make findings on each specific item of requested or awarded damages indicating that portion of the judgment or decree awarded for past damages and that portion awarded for future damages. The apparent objective of this Section is to allow the Court to assess interest on past damages only. Regrettably, 668.3(8) has led to a verdict form which contains a line for each item of damages that the plaintiff demands. Most defendants would prefer either verdict form 300.2 or 300.4 (Iowa Civil Jury Instructions). The prospect of the jury going through each element of damage and filling in a number on each of those lines is disconcerting, to say the least. Unfortunately, that appears to be what Section 668.3(8) requires. It should be noted that the Iowa Civil Jury Instructions do not yet include a verdict form which reflects this change in the law.

Section 668.14 was also adopted by the 1987 legislature, effective July 1, 1987. That Section provides that in an action seeking damages for personal injury the Court shall permit evidence and argument as to previous payment or right of future payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, etc. This Section appears to be patterned after Chapter 147.136. However, the jury is merely apprised of the collateral source, but there can still be recovery for damages which have already been compensated through insurance and the like. The Court shall also permit evidence and argument regarding any existing rights of indemnification or subrogation relating to said past or future payments. Once again, the jury is required to answer special interrogatories indicating the effect of such evidence or argument on the verdict (what does that mean?). It would appear that the most beneficial effect of this Section is that in a close case of liability, defense counsel can argue to the jury that they should not be moved by the out of pocket losses, particularly medical bills, incurred by the plaintiff because those bills have been or will be paid.

Finally, the Supreme Court adopted Rule 125 regarding discovery of experts which was effective August 3, 1987.

Conclusion

One of the functions of the Iowa Defense Counsel is to initiate or influence legislation having a direct impact on litigation with the hope that such legislation can promote both balance and fairness to the defense side of the case. Consequently, it is appropriate that members of this organization periodically review previous legislation which was designed to provide some assistance to the defense in an effort to determine whether the objectives of such legislation have been accomplished. Although a few of the statutory changes over the last 15 years have had some beneficial impact, the great majority of such changes have had little or no impact on the defense of a lawsuit. Of

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However, part of the problem may be the need to inform lawyers of rules of professional courtesy. When the legal profession was smaller and more closely knit, the professional courtesies could be learned from peers. Perhaps more emphasis is needed in law schools and by Bar Associations to inform lawyers of professional courtesies. The Code of Professional Responsibility includes standards for courtesy. EC 7-37 states that ill feelings between clients should not influence a lawyer's "conduct, attitude and demeanor towards opposing lawyers." EC 7-38 provides that "a lawyer should always be courteous to opposing counsel and should accede to reasonable requests . . . (and) should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments." The United States District Court for the Northern District of Texas adopted the Dallas Bar Association's guidelines and creed relating to courtesy as standards expected by the court. 121 F.R.D. 284 (N.D. Tex. 1988).

In summary, it seems to be accepted that there is a decline in professional courtesies and a need to restore courtesies consistent with a true learned profession. Practical suggestions include the following: (1) adopting codes of professional courtesy, (2) creation of Bar Association committees or structures to allow experienced lawyers to assist newly admitted lawyers relating to issues involving ethics and courtesy, (3) urging law schools to give more emphasis to ethics and courtesies, (4) CLE programs, (5) more involvement by the Committee on Professional Ethics and Grievance Commission in the fields of courtesy and ethics and (6) more active role by trial judges in matters relating to courtesy and ethics.

Perhaps the Iowa Defense Counsel Association should consider some activity in this area.

The Association might also consider a comparison of the Model Rules adopted by the ABA in 1983 (Volume VIII Martindale-Hubbel) with the Iowa Code of Professional Responsibility with a view toward possible recommendations in the areas of litigation abuse, misuse and courtesies.

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course, one major exception to this would be the Comparative Fault Act, adopted in 1984, but that Act was prompted by the Supreme Court decision of *Goetzman v. Wichern, M.D.*, 327 N.W.2d 742 (Iowa 1982), rather than any legislative initiative.

IDCA RECEIVES NATIONAL ATTENTION

In the February, 1990 issue of "For The Defense" magazine, the Iowa Defense Counsel Association is recognized for its efforts. In a supplement to the magazine entitled "Defense Law News," Cinda Berry describes the endeavors of IDCA. The article is entitled "Defense Group Going Strong In The Heartland."

Besides noting IDCA's past accomplishments, the article also uses quotes from president Craig Warner, founding member Ed Seitzinger, and Lanny Elgar, IDCA board member. Reference is also made to the contributions of Gene Marlett, IDCA treasurer, Herb Selby, legislative committee chairman, Ralph Gearhart, past IDCA president, and Bob Fanter, DRI board member.

Lou Potter, executive director of the Defense Research Institute is quoted in the article, "It is a very strong association. There seems to be an unusual amount of cohesiveness among the members and the organization itself seems to be well known and well respected in the state."

FAREWELL

With regret we say goodbye to one of our editors, Ross Walters. Ross has already assumed his new duties as District Judge for the Fifth Judicial District. We will miss Ross and thank him for his efforts in the past year. We wish him well in his new career.

NOTE FROM THE EDITORS

Reality - theologians, philosophers and scholars have spent considerable time and effort in determining what reality is. Reality to an attorney defending an individual or a corporation becomes blurred when the insurance company enters the defense of a suit. On one hand, their attorney represents the named defendant (usually the policy holder) but is paid by the insurance company. Who is the client? The appellate courts and the legal model provide a clear answer - the defendant. But reality sometimes reveals a different answer - the party who makes the initial decisions on the suit and pays the fee bills of the attorney, the insurance company.

It is difficult to serve two masters, but reality forces the defense attorney to find a way to do so. He must serve and protect the named defendant and yet provide advice and counsel to the insurance company to allow them to make the proper decision on behalf of the insured. He must also justify his fee bill for the legal work provided. Complicating this issue is the advent of the petitions containing "unspecified damages". With every suit now being a possible excess claim the reality becomes more blurred.

How does an attorney handle this? There is one small and effective way to help in this dilemma, but is not universally accepted. By sending copies of all correspondence between the attorney and the insurance company to the defendant, many problems may be avoided. Is not the defendant the true client? Has not the defendant paid a premium to be defended? Is he not entitled to know the status of the suit? The appellate courts will think so if the suit becomes a quagmire known as a bad faith claim. Keep in mind the defendant should have received an excess letter from the insurance company clearly setting out his interest in this matter.

It has to be acknowledged that certain communications may have to be done in person or by telephone between the attorney and the insurance company on certain sensitive issues. However, it would appear that the majority of all communications should be copied to the insured to keep him advised of all developments. To do otherwise, the issue of reality becomes more blurred and may risk the defense attorney to the possible nightmare of bad faith.

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